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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

PETER G. TEN EYCK, as Commissioner of Agriculture and Markets of the State of New York, and others, *Appellants*, against G. A. F. SEELIG, INC., *Respondent*.	*No. 604.*
G. A. F. SEELIG, INC., *Appellant*, against PETER G. TEN EYCK, as Commissioner, etc., and others, *Respondents*.	*No. 605.*

BRIEF FOR APPELLANTS.

(In No. 604; also for Respondents in No. 605)

This is an appeal and cross-appeal from the United States District Court for the Southern District of New York. The only opinion of the Court below is reported at 7 F. Supp. 776. That opinion was written upon the granting of the temporary injunction, but the final decree refers to it and adopts it for justification of the permanent injunction. (R. 49, 64.)

Statement of the Case.

The statute involved is the Milk Control Law of New York State. That statute provides for the fixing of certain minimum prices below which milk shall not be purchased from producers by milk dealers selling milk for fluid consumption, and certain minimum prices below which milk shall not be sold by milk dealers to consumers. In two cases involving strictly intrastate transactions in milk those provisions have been sustained against attack under the Fourteenth Amendment. *Nebbia v. New York*, 291 U. S. 502, Mar. 5, 1934; *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, Nov. 5, 1934. The present case involves a milk dealer engaged in importing milk from Vermont and selling it in New York City, and certain questions are presented under the Commerce Clause.

The milk market centering about New York City and including Newark and adjacent parts of New Jersey, is called the "New York Metropolitan District." Over 10,000,000 people live in the Metropolitan District, and 68 per cent of them live in New York City. Milk can be sold in New York City only if it comes from milk plants approved by its Health Department, and the same is true of the other municipalities involved. The area including all the approved plants is usually referred to as the "New York Milk Shed." It contains all of New York State and substantial parts of New Jersey, Pennsylvania and Vermont, plus small parts of a few other States. Approximately 70 per cent of the milk and cream consumed in the Metropolitan District is produced in New York State and approximately 30 per cent comes from other States. (1933 N. Y. Legis.

Doc. No. 114, pages 32-38; Finding 23 of the District Court, and Exhibit E annexed, R. 61, 47.)

G. A. F. Seelig, Inc. and Seelig Creamery Corporation are New York State corporations, closely affiliated in ownership and management. Seelig Creamery Corporation operates a milk plant at Fair Haven, Vermont, where it buys and receives milk from farmers. The entire output of the plant is sold to G. A. F. Seelig, Inc., under an annual contract, and this constitutes its principal milk supply. Delivery is made F.O.B. Fair Haven, Vermont. The milk goes to New York City and is sold there by G. A. F. Seelig, Inc., mostly to hotels and similar establishments and mostly in the same forty-quart cans in which it was loaded upon a train in Vermont. (Findings 4-13, R. 57.) Findings 8-10-11 are as follows:

> "Seelig Creamery Corporation buys from certain selected farmers or producers of the milk shed in and about Fair Haven, Vermont, all of the milk offered to it daily. About 450 forty-quart cans of milk are received there daily from about 125 farmers. This milk is pasteurized there (excepting milk which is to be bottled in New York City) and some of it is separated into cream. All of this milk goes to New York City by rail, in forty-quart cans, some in the form of milk and some in the form of cream. Each day the milk and cream, pasteurized and in cans owned by the plaintiff, is loaded into a railway car at Fair Haven, Vermont, consigned to the plaintiff at New York City. The daily shipment is somewhat over 200 cans of milk and about 20 cans of cream, which is shipped each day as a carload lot, F.O.B. Fair Haven, Vermont."
>
> "Upon arrival in New York City of the daily carload of milk from Fair Haven, Vermont, the car

is opened, some cans are taken upon the plaintiff's trucks to the customers, and some are taken to the 29th Street plant and either called for by customers or sent out in plaintiff's trucks for delivery to customers. The sales by the plaintiff of milk and cream are mostly to hotels, restaurants, clubs, hospitals and stores in New York City, and mostly it is delivered in the same forty-quart cans in which it came from Fair Haven, Vermont."

"About 10% of the milk is bottled in New York City and delivered to customers in bottles. Plaintiff has no pasteurizing and bottling facilities of its own in New York City, and this work is done for it by another milk dealer."

If this milk were purchased from producers in New York State it could not be sold within the State. The producers at Fair Haven are paid for it less than the minimum prices established for payment to New York State producers (Finding 20, and Exhibit D, R. 61, 48), and the Milk Control Law forbids sale to New York State consumers of milk which has been bought from producers too cheaply. One of the general provisions to that end is found in section 257, and is as follows:

"It shall be unlawful for a milk dealer to * * * in any way deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this chapter."

The statute attempts to apply the same policy to milk originating out of New York State and offered for sale therein. That provision is found in section 258-m, subdivision 4, and is as follows:

"It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced out-

side of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed milk dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful."

The validity of that provision became a direct issue between the parties in May 1934. G. A. F. Seelig, Inc. was required to obtain a license in order to continue its milk business in New York City, but the Commissioner refused to license any dealer unless it would agree in writing to comply with the statute and orders issued thereunder, and, in the case of dealers handling milk produced outside the State, answer affirmatively the following questions:

"Do you agree not to sell within New York State, after it has come to rest within the State, milk or cream purchased from producers without the State at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions?"

"Do you agree that you will obtain for the Commissioner and supply to him, at such times and in such manner as he requires, concerning milk and cream produced without the State and in any way dealt in by you, data to whatever extent is necessary to ascertain or compute whether the producers were paid for such milk or cream a price not lower than that required to be paid producers for milk or cream produced within New York State and purchased under similar conditions?" (R. 62.)

Proceedings in the Case.

G. A. F. Seelig, Inc., being advised that the statutory provision was unconstitutional, was unwilling to make an application in the form required by the Commissioner, and without a license it was exposed to penalties numerous and severe. Accordingly it commenced this suit, to enjoin the Commissioner from his insistence upon the conditions alleged to be unconstitutional, and him and other officials from proceedings to enforce the statutory provision. No question is raised as to the propriety of the remedy.

The application for an injunction was heard by three judges, under provisions of United States Code, Title 28, Section 380. On August 2, 1934, the District Court rendered its decision, expressed in an opinion by Honorable Learned Hand, Circuit Court Judge. A decree was entered, somewhat uncertain in form as to whether it was interlocutory or permanent, and an appeal was taken to this Court, which on October 15, 1934, affirmed without argument or consideration of the merits, upon the view that the decree was interlocutory and involved no error of discretion.

Thereafter the parties submitted to the three-judge District Court the application of G. A. F. Seelig, Inc. for a final injunction, and the motion of the defendants to dismiss the bill of complaint. A stipulation of fact was entered into and submitted, which the District Court adopted as findings of fact for purposes of the final decree. No new opinion was written, or conclusions of law, but the final decree adopted the opinion previously written. Accordingly, the final decree

favors G. A. F. Seelig, Inc. as to the imported milk which it sells in cans, upon the view that they are "original packages" and cannot be regulated by the State, but holds that the State can regulate so much as is bottled.

The defendants appealed from that decree and the plaintiff took a cross-appeal from the part relating to bottled milk. On January 14 this Court found probable jurisdiction and assigned the appeals for argument on February 11.

Assignment of Errors.

The defendants assign the following errors:

1. The District Court erred in granting any final injunction herein against exacting from the plaintiff a certain agreement as a condition of issuing to it a license.

2. The District Court erred in granting any final injunction against prosecuting the plaintiff.

3. The District Court erred in refusing to dismiss the bill; and in each and every conclusion of law stated in its opinion and leading to the three errors previously assigned.

Summary of Argument.

POINT I. The purposes of the statute are to protect the health and welfare of New York State citizens. It does not discriminate against products coming into the State in interstate commerce. It is concerned with a problem which is predominantly local.

POINT II. Congress has not occupied the field in any exclusive manner; on the contrary State regulation has received some Federal encouragement.

POINT III. Each State may use its police power to regulate business within its own borders to the extent necessary to protect its citizens as to their health, safety, morals and general welfare, even though interstate commerce is affected as an incident to such regulation.

POINT IV. A regulation so necessary and reasonable that it is valid for application to strictly intrastate business is not forbidden to have some incidental effects upon interstate commerce; hence when its subject matter is primarily of local concern a regulation which is justifiable under the Fourteenth Amendment and which neither discriminates against interstate commerce nor conflicts with any Federal regulation is justifiable under the Commerce Clause.

POINT V. There is need that the State power be upheld. The decree below should be reversed insofar as it grants injunction against the defendants.

POINT I.

The purposes of the statute are to protect the health and welfare of New York State citizens. It does not discriminate against products coming into the State in interstate commerce. It is concerned with a problem which is predominantly local.

In *Nebbia v. New York*, 291, U. S. 502, 517, occurs the following statement:

"Failure of producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination."

Mr. Justice Roberts did not write that sentence, or any other in the opinion, except in careful reliance upon the data before the Court. At pages 70-75 of the Report of the Legislative Committee which drafted the Milk Control Law (1933 N. Y. Legis. Doc. No. 114) are stated the health implications of the statute:

"The consequences of very inadequate returns to the producers of milk are likely to manifest themselves (1) in a lowering of quality because of enforced relaxation of safeguards in the production and distribution of milk; (2) in a gradual curtailment of the supply of milk produced in the milk shed which meets the special requirements for New York and other cities; (3) in possible interruptions of the milk supply due to strikes and disorders.

The price of milk has a very definite relation to its quality. Strict supervision and control of milk supplies are necessary for the protection of public health, and to encourage generous use of this important food. At the same time, these sanitary regulations add much to the cost of producing and handling market milk. Regulations in respect to the examination and health of cattle tend to increase the investment which the farmer has to make in livestock, and the annual depreciation thereon. The regulations in respect to stables—floors, light, ventilation, whitewashing, separation of horses—and milk house separated from the stable, likewise add to the producer's investment and the overhead costs of producing milk.

The requirement that milk be cooled to 60 degrees or lower immediately after milking usually means putting up a supply of natural ice, or providing electrical refrigeration. A recent survey in Rhode Island showed the cost of electric cooling

on the farm to be from 12 to 14 cents per 100 pounds of milk, compared to 10 cents per 100 pounds for cooling with ice. If the price received for milk were such as to justify the purchase of electrical coolers, they soon would be generally used on the dairy farms and the quality of milk would be much improved. Special care in the handling of milk both on the farm and in the process of transportation and distribution is necessary to keep the bacteria count below the prescribed maximum, and this further increases the expense. Market milk must be delivered to the plant every day, usually at an early hour, while cream for buttermaking need be delivered only from once to three times a week.

* * * * *

"The effect of modern sanitary control upon the costs of producing and handling milk, explains in part the wide spread between the price paid for milk by the consumer and the price received by the producer. It also clearly indicates the necessity for a premium to the producer for market milk, over the price ordinarily received for milk which is produced for butter or cheese factories. Unless such a premium were paid, the producers obviously would not continue to go to the expense of meeting the special requirements for market milk. They would find it more profitable to deliver milk to cheese factories or cream to butter factories. Of course quality standards for market milk will be maintained during short periods when prices do not fully compensate producers or dealers for the necessary costs. However, an extended period of prices much below the costs of producing milk in accordance with these standards would inevitably have an unfavorable effect upon the quality of the milk supply. Eventually there would be a shortage of milk which fully met the requirements. Further, it must be realized that the sanitary requirements imposed by the cities and the state are minimum standards. Since a large part of the milk supply normally is well above these minimum standards, a considerable decline in

quality may occur without violating the official requirements.

This view of the probable effect of inadequate price returns upon the quality of the milk supply was effectively expressed by Dr. Paul B. Brooks, Deputy Commissioner of Health of the State of New York, in a letter to the Committee. 'In my opinion', said Dr. Brooks, 'there is no doubt but that the low price received by the producer for milk and the general disturbed conditions in the milk industry are bound to have an unfavorable effect on the safety and general quality of milk sold in the state.'

The statement of Dr. Russell [Chairman of the Milk Committee of the Department of Health, State of New Jersey] also emphasizes this point. 'In the long run,' he said, 'the public will get what it pays for. If sanitary regulations break down and become unenforceable, the public may get a cheap article, but it will not be either safe or wholesome.'

A similar view of the effect of low prices upon the quality of milk was expressed by Mr. Floyd Shimel, producer, and President of the Farm Bureau of Jefferson County, in his testimony before the Committee. '* * * Cheap milk will have its effect on quality. Lack of funds will mean that many of those improvements which tend towards better quality will not be had. Present continued low prices are bound to discourage the producer and there will be among some a feeling that quality, under present conditions, is not to them an important factor.'

* * * * * *

"In the long run the quantity of milk produced is determined by the price which the farmer receives. Of this there can be no doubt.

Price changes, either up or down, have both an immediate and a delayed effect upon production. The producer responds to price changes by increasing or decreasing the amount and quality of the grain ration fed to cows, and milk production is promptly affected thereby. He also responds

to price changes by increasing or decreasing the size of his herd. This is done mainly by raising more or fewer heifer calves, and the effect on milk production is not felt for at least three or four years. Meanwhile the production of milk is raised or reduced somewhat by selling more or fewer of the old and low producing cows, and by changes in the number of cows shipped into or shipped out of the state.

* * * * *

"For the immediate future, the production of milk in the New York milk shed probably will be ample. Reduced feeding apparently will not overcome the increased capacity for production, caused by the periodic increase in number of cows, or the reduced consumption due to unemployment. The outlook for later years is entirely different. That the supply of milk for the people of this state ultimately will be seriously reduced because of the extremely low prices received by farmers is certain. High prices then will be necessary to stimulate dairying and to restore the production of milk to a level from which it never should have been allowed to fall."

The Legislature in enacting the Milk Control Law made an express finding that there were objectionable trade practices in the production, sale and distribution of milk, "whereby the dairy industry in the state and the constant supply of pure milk to the inhabitants of the state are imperiled." "That such conditions constitute a menace to the health, welfare and reasonable comfort of the inhabitants of the state." "That the danger to the public health and welfare is immediate and impending." The Report shows more definitely what perils to health and welfare were feared. The Legislature regarded it as unwise for milk consumers in New York State to drink milk supplied by producers who were underpaid, because of the danger

that health standards would not be maintained for such milk, and also because of the danger that the supply would not be maintained.

It is well known to everyone who has given serious attention to milk problems that around every great milk consuming center there forms an economic unit known as a "milk shed". Problems of production must be thought of in terms of that unit, even when the viewpoint of interest is the consuming market. Mr. Justice Roberts said (pages 517-518):

> "A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk shed."

Although supplying New York State markets with milk is predominantly an industry of the State, the milk shed extends into other States, and underpaid farmers in the extra-state parts of the milk shed present the same dangers to New York State health and welfare as underpaid farmers within the State. The statute has a health purpose applicable to all milk produced for sale in New York State.

The appearance of novelty in the present case arises from the fact that this statute is a price regulation directly, and few such have heretofore been sustained. The novelty is in the approach and not in the underlying purpose.* It is well recognized that New York State can forbid unwholesome milk to be sold regardless of its source; but that New York State forbids

* See the dissenting opinion of Mr. Justice Stone in Ribnik v. McBride, 277 U. S. 350, 374: "I can see no difference between a reasonable regulation of price and a reasonable regulation of the use of property", etc.

cheap milk to be sold requires some adjustment of viewpoint. It may be urged that this regulation is primarily for the economic welfare of producers. The material quoted above indicates that this is too narrow a view of the purpose of the statute, but however that may be, since *Nebbia v. New York* the welfare protected by this statute has been recognized as within the scope of the police power, just as much as the health welfare of consumers, and it will justify giving the statute just as broad effects.

There is nothing discriminatory about the statute now involved. The orders fixing the minimum prices to producers allow producers in Vermont and Pennsylvania to sell their milk for shipment to New York just as cheaply as it could be sold by producers in New York. Equal quality milk brings an equal price everywhere, except that milk farther from market is worth less to the extent of the difference in freight rate. The freight differential fixed by the orders is the actual L. C. L. railroad freight rate. (R. 24.) That makes it possible for a farmer in northern Vermont to sell his milk for consumption in New York City at a price directly comparable with a farmer in any part of New York State; to the extent that carload rates or truck rates are more favorable than L. C. L. the more distant producer may actually have an advantage.

The best proof that this provision is not discriminatory is that Pennsylvania, the largest competitor for the New York market, supports it. The 1933 Milk Control Law was enacted in New York State on April 10. It contained the provision now in question in section 312, g. When New Jersey enacted its Milk

Control Law about a month later it copied the provision. Chapter 169, N. J. Laws of 1933, art. VII, 1, c. Pennsylvania enacted a Milk Control Law on January 2, 1934. Not only did it copy this provision, but it added to it another new provision intended to give it support (Act of Penn. General Assembly No. 37, section 18, h):

> "It is also declared to be the legislative intent that the producers of milk in this Commonwealth who sell their milk to milk dealers for shipment into and sale in another state, where prices to producers are regulated by a state board or other authority with powers substantially similar to the Milk Control Board established by this act, shall receive the same price that producers in such other state receive for milk purchased for similar purposes and under similar conditions, less a proper allowance for the transportation thereof. It shall be unlawful for any milk dealer, except in any cases in which the board shall otherwise determine, to pay to a producer within this Commonwealth, for milk to be sold in such other state, a price lower than that fixed by the state board or other authority in such other state for sale of milk in such other state for similar purposes and under similar conditions, minus a proper allowance for the transportation of the milk to the market in such other state."

The fact that the New York statute is not discriminatory was recognized by Circuit Judge Learned Hand in his opinion for the Court below. He said (R. 55):

> "We do not of course mean that the plan is not commendable in itself, or that the means are not well adapted to the end. Nebbia v. N. Y., 291 U. S. 502, has authoritatively settled the state's power, and it is easy to see how the whole scheme might be imperilled, and conceivably wrecked, unless foreign milk, bought at cut prices, could be kept

> out of competition with the domestic supply. Furthermore, though a complete exclusion would give even greater security, it might have been open to a charge of unfair discrimination, which cannot be made as it is. The act does not try to circumscribe the 'milk-shed' as equal competition defines it; it merely prevents price-cutting throughout its area. So put, there is much to be said for the propriety of the extraterritorial feature, and Congress might well be induced to sanction it as it stands. But that sanction is, we think, essential to its validity."

Cheese and butter and canned condensed milk are commodities that pass freely across the continent and enter into a nation-wide competition. Any regulation imposed upon those has a strong tendency to burden interstate commerce. The case for fluid milk and cream is different. Milk is a commodity which must be supplied steadily, day after day and even year after year, and it must come from sources inspected and kept up to high sanitary standards. Each milk shed tends to become a reasonably constant and well defined unit, centering about a particular market or markets. Such a business does not observe State lines, and yet it is predominantly local. The interests involved center about the particular market, and are not diffused throughout the Nation. Supplying fresh milk is a local business, like supplying water (*Hudson County Water Co. v. McCarter*, 209 U. S. 349); it is not a national business like supplying wheat. (*Lemke v. Farmers Grain Co.*, 258 U. S. 50; *Shafer v. Farmers Grain Co.*, 268 U. S. 189.)

The regulation of the milk shed centering about the New York Metropolitan District is predominantly a local interest. Reference has already been made to

data showing that 70 per cent of the milk is produced in New York State. A wealth of additional data can be obtained from two booklets published by the Cornell University Agricultural Experiment Station, Ithaca, N. Y. One is *"A Statistical Study of Milk Production for the New York Market"*, written by M. P. Catherwood and published in April 1931; the other is *"The Supply Side of the New York Milk Market"*, written by H. A. Ross and published in September 1931.

POINT II.

Congress has not occupied the field in any exclusive manner; on the contrary State regulation has received some Federal encouragement.

It is well known that the United States has a paramount control over interstate commerce and when it occupies a particular field it can exclude the States from any regulation upon the same subject matter. However, it is apparent that Congress has not attempted to exclude the States from regulating the interstate shipment of milk and cream. As recently as 1927 it expressly recognized their right to regulate such a matter. The Act of February 15, 1927 (ch. 155; 44 Stat. 1101; U. S. Code, Title 21, §148) regulated the importation of milk and cream from Canada and other places outside the United States, and in the course of that statute Congress said:

> "Nothing in this Act is intended nor shall be construed to affect the powers of any State, or any political subdivision thereof, to regulate the shipment of milk or cream into, or the handling, sale or other disposition of milk or cream in, such State or political subdivision after the milk or cream shall have been lawfully imported under the provisions of this Act."

No change in that situation, so far as concerns the New York milk shed, has been produced by the Agricultural Adjustment Act of May 12, 1933. That Act confers upon the Secretary of Agriculture power:

> "To enter into marketing agreements with processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce of any agricultural commodity or product thereof, after due notice and opportunity for hearing to interested parties."

> "To issue licenses permitting processors, association of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or of any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof."

It is assumed that those provisions confer upon the Secretary of Agriculture power to regulate interstate commerce in milk moving into the New York market, but the fact is that he has not exercised the power in that market. His power to regulate completely certain other markets is in question*, and attempts to

* In the following cases United States District Courts either enjoined regulation of a milk market by the Secretary of Agriculture or other officers, or declined to support it. **Royal Farms Dairy v. Wallace**, 7 F. Supp. 560 (June 19, 1934, Dist. Ct. Md.); **Edgewater Dairy Co. v. Wallace**, 7 F. Supp. 121 (June 26, 1934, Dist. Ct. Ill.); **Hill v. Darger**, 8 F. Supp. 189 (Sept. 7, 1934, Dist. Ct. Calif.); **United States v. Greenwood Dairy Farms**, 8 F. Supp. 398 (Sept. 27, 1934, Dist. Ct. Ind.); **Douglas v. Wallace**, 8 F. Supp. 379 (Oct. 17, 1934, Dist. Ct. Okla.); **United States v. Neuendorf**, 8 F. Supp. 403 (Oct. 19, 1934, Dist. Ct. Ia.); **Royal Farms Dairy v. Wallace** (Nov. 17, 1934, Dist. Ct. Md.); **Columbus Milk Producers v. Wallace**, 8 F Supp. 1014 (Nov. 20, 1934, Dist. Ct. Ill.). See also, **Black v. Little**, 8 F. Supp. 867 (Nov. 21, 1934, Dist. Ct. Mich.)

negotiate a milk marketing agreement for the New York market have thus far been fruitless.* Officials of the Agricultural Adjustment Administration recently have been expressing willingness to cooperate with Milk Control Boards and urging the States which lack them to enact Milk Control Laws.**

POINT III.

Each State may use its police power to regulate business within its own borders to the extent necessary to protect its citizens as to their health, safety, morals and general welfare, even though interstate commerce is affected as an incident to such regulation.

New York State has a motion picture censorship law, and will not permit to be exhibited to its citizens any picture which its censors regard as indecent. Most of the films are made in California. Not only does the New York censorship operate directly upon each film after it has came to rest in the State through channels of interstate commerce, but it can be demonstrated that the existence of the New York censorship affects indirectly what is done (and omitted) in Hollywood.

A few years ago, after Henry Ford had started manufacture of his model A automobile with only one

* From August 1933 to January 1934 an effort was made to work out a milk marketing agreement for the New York market, unsuccessfully. Early in 1934 the Secretary of Agriculture considered regulating the market by license, but his proposal was thought by the Attorney General of New York State to involve such an invasion of State powers as to be unconstitutional. See the opinion of the Attorney General, N. Y. Times of Feb. 3, 1934; see also article by Henry S. Manley in N. Y. S. Bar Asso. Bulletin of March 1934, pages 126-129. Another effort to draft a marketing agreement was commenced in September 1934 and recently has encountered difficulties. N. Y. Times, Jan. 13, 1935, first section, page 3; Dairymens League News, Jan. 15; Watertown N. Y. Daily Times, Jan. 18.

** See, for example, an address by A. H. Lauterbach, Chief of Dairy Section, A.A.A., before Nat. Co-op. Milk Producers Fed. at Syracuse, N. Y., Nov. 13, 1934, as reported in Dairymens League News of Nov. 20, pages 2, 15.

set of brakes, it was discovered that Pennsylvania required two independent sets of brakes. The Commonwealth maintained its position, and Ford revised his model, without litigation. In forty-seven other states the single-brake automobile was a legitimate article of commerce, but Pennsylvania was exercising a reasonable, even though somewhat independent, judgment for the protection of its citizens. This was its right, and had effects throughout the continent.

An Oklahoma commission prorated the production of petroleum from a common source to prevent waste. The order was upheld against attack by a corporation which was engaged in selling the petroleum and its products in interstate commerce. This was merely a regulation of production and within the power of the State. Nobody but the corporation and its counsel seemed to be much troubled about the fact that petroleum denied production in Oklahoma cannot be transported to another State or used in airplanes.

Late in 1932 New York State forbade cattle to be brought within its borders unless they came from herds free from Bang's disease. In 1932 there were imported into the State about 36,000 cattle and in 1933 less than 2,000. Presumably the Wisconsin cattle dealers who contested the issue were the greatest losers, but the Commerce Clause did not maintain them in carrying on an interstate commerce in cattle one in ten of which probably were bearers of a highly contagious disease.

Those are merely illustrations from present day businesses of the fact that a State may so exercise its police power as to have important incidental effects upon interstate commerce. It may regulate the use and sale of goods which have come to it in interstate com-

merce, the production of goods which are to go in such commerce, or even, in some cases, it may exercise its police power directly upon goods while they are in interstate commerce. Nothing in that is inconsistent with the history and purposes of the Commerce Clause.

The purposes of the Commerce Clause are two. The one originally of greater importance was to prevent discrimination by the several States, each designing to favor its own products and the local businesses of its citizens. The other, which has become of constantly increasing importance in recent years, is to authorize Congress to give interstate commerce a uniform regulation.

From those two purposes, and the fact that the States retain the mass of sovereign power, there have been derived 857 decisions of this Court interpreting the Commerce Clause.* Each of several commentators has built up a volume of principles and branches and exceptions so as to provide each of those 857 cases with its appropriate and preordained relationship by footnote to a balanced logical structure. Perhaps an equally correct view of the limitations imposed by the Commerce Clause upon State legislation can be stated in terms of three principles only, the third achieving flexibility of application in diverse cases by giving weight to practical differences.** Tax cases will be ignored for the most part in this brief, upon the view that they involve some considerations not applicable to regulatory statutes.***

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* Bernard C. Gavit, "The Commerce Clause of the United States Constitution", digests 839 decisions to the end of 286 U. S., not including all of the 1932 term. To the end of 1934 we count 18 more.

** Thomas Reed Powell introduces his discussion of "Current conflicts between the Commerce Clause and the State police power, 1922-1927", 12 Minn. L. Rev. 321, with the observation at page 324, "The decisions are to be presented not as the supporting data for black-letter principles but as a succession of particularistic though more or less related judgments."

*** See pages 41-42 of this brief as to the peculiarity of tax cases.

It will readily be agreed that there are two limitations upon State power corresponding to the two purposes of the Commerce Clause already mentioned. The State statute must not be discriminatory, and it must not conflict with any regulation of commerce enacted by Congress. Those are two definite principles or limitations.

Assuming that the State statute is not objectionable upon either of those grounds, but puts some incidental burden or restraint upon interstate commerce, the decision as to its validity will depend upon a balancing of the national and local interests practically involved. In other words, a State can burden interstate commerce some to afford necessary protection to its people, but it cannot burden interstate commerce much merely to protect its people a little.

The discussion of that proposition will be deferred until the next point of this brief. The present point is concerned only with giving definiteness, by a few illustrations, to a proposition which is probably obvious as a generality—that interstate commerce can be affected incidentally by a valid State regulation.

Plumley v. Massachusetts, 155 U. S. 461, sustained a statute which excluded oleomargarine colored in imitation of yellow butter, saying (468):

> "The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. * * * Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?"

Hennington v. Georgia, 163 U. S. 299, upheld a statute which prohibited running any freight train on Sunday. This Court said (317-318):

> "Local laws of the character mentioned [having a real relation to the domestic peace, order, health and safety of the people of the State] have their source in the powers which the States reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight."

Hygrade Provision Co. v. Sherman, 266 U. S. 497, involved the constitutionality of a statute of New York State forbidding the false and fraudulent labeling of meat as "kosher." The statute was sustained even as to sales in the original packages of meat of extra-state origin. Mr. Justice Sutherland delivered the opinion of the Court and in the course of it he said (503):

> "Lewis & Fox Company [one of the plaintiffs] is a Massachusetts corporation conducting a general provision supply business including the shipment and sale of original packages into and within the State of New York. It is this situation which forms the basis of the contention that the commerce clause is violated. It is enough to say that the statutes now assailed are not aimed at interstate commerce, do not impose a direct burden upon such commerce, make no discrimination

against it, are fairly within the range of the police power of the State, bear a reasonable relation to the legitimate purpose of the enactments, and do not conflict with any congressional regulation. Under these circumstances they are not invalid because they may incidentally affect interstate commerce."

Packer Corporation v. Utah, 285 U. S. 105, upheld a statute against advertising tobacco on billboards, in a State which produces no tobacco and where the posters also were shipped in from without the State. Mr. Justice Brandeis said (111-112):

"The defendant contends also that the statute imposes an unreasonable restraint upon interstate commerce because it prevents the display on billboards of posters shipped from another State. * * * So far as the posters are concerned * * * the statute is aimed, not at their importation, but at their use when affixed to billboards permanently located in the State. * * * The prohibition is non-discriminatory, applying regardless of the origin of the poster. Its operation is wholly intrastate, beginning after the interstate movement of the poster has ceased. Compare *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 503; *Hebe Co. v. Shaw*, 248 U. S. 297, 304. See also *Corn Products Refining Co. v. Eddy*, 249 U. S. 427, 433. To sustain the defendant's contention would be to hold that the posters, because of their origin, were entitled to permanent immunity from the exercise of state regulatory power. The Federal Constitution does not so require. Compare *Mutual Film Corp. v. Industrial Commission*, 236 U. S. 230, 240, 241."

Bradley v. Pub. Util. Comm., 289 U. S. 92, upheld denial to a common carrier of permission to operate upon a particular highway, upon the ground that the

proposed route already was dangerously congested. Mr. Justice Brandeis said (95-96, citations omitted):

> "It is contended that an order denying to a common carrier by motor a certificate to engage in interstate transportation necessarily violates the Commerce Clause. * * * In the case at bar the purpose of the denial was to promote safety; and the test employed was congestion of the highway. The effect of the denial upon interstate commerce was merely an incident. Protection against accidents, as against crime, presents ordinarily a local problem. Regulation to ensure safety is an exercise of the police power. It is primarily a state function, whether the *locus* be private property or the public highways. Congress has not dealt with the subject. Hence, even where the motor cars are used exclusively in interstate commerce a state may freely exact registration of the vehicle and an operator's license, may require the appointment of an agent upon whom the process may be served in an action arising out of operation of the vehicle within the State, and may require carriers to file contracts providing adequate insurance for the payment of judgments recovered for certain injuries resulting from their operations. The State may exclude from the public highways vehicles engaged exclusively in interstate commerce, if of a size deemed dangerous to the public safety. Safety may require that no additional vehicle be admitted to the highway. The Commerce Clause is not violated by denial of the certificate to the appellant, if upon adequate evidence denial is deemed necessary to promote the public safety."

Mintz v. Baldwin, 289 U. S. 346, sustained an order forbidding cattle to be brought into New York State except from herds free from Bang's disease. Mr. Justice Butler said (349-350):

> "The order is an inspection measure. Undoubtedly it was promulgated in good faith and is appropriate for the prevention of further spread of

> the disease among dairy cattle and to safeguard public health. It cannot be maintained therefore that the order so unnecessarily burdens interstate commerce as to contravene the commerce clause. [citing cases.] Unless limited by the exercise of federal authority under the commerce clause, the State has power to make and enforce the order."

Upon all of the foregoing, it is respectfully submitted that a State may use its police power to regulate business within its own borders to whatever extent is necessary to protect its citizens as to their health, safety, morals and general welfare, even though interstate commerce is affected as an incident to such regulation. That principle is well recognized and extensive in its effects.

POINT IV.

A regulation so necessary and reasonable that it is valid for application to strictly intrastate business is not forbidden to have some incidental effects upon interstate commerce; hence when its subject matter is primarily of local concern a regulation which is justifiable under the Fourteenth Amendment and which neither discriminates against interstate commerce nor conflicts with any Federal regulation is justifiable under the Commerce Clause.

We already have stated the proposition that if a State statute does not discriminate against interstate commerce, and does not conflict with any regulation of commerce enacted by Congress, but puts some incidental burden or restraint upon interstate commerce, the

decision as to its validity will depend upon a balancing of the national and local interests practically involved. "A State can burden interstate commerce some to afford necessary protection to its people, but it cannot burden interstate commerce much merely to protect its people a little." (Page 22 of this brief.)

A statement so adaptable has at least the virtue of reconciling some difficult cases. It may afford them the only reconciliation of which they are capable, and be the true basis of their consistency. Mr. Justice Holmes stated the matter as follows in *Galveston etc. Co. v. Texas,* 210 U. S. 217, 225:

> "It being once admitted, as of course it must be, that not every law that affects commerce among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines."

The earlier cases involving state regulations of railroads, before Congress had so fully occupied that ground, afford some illustrations of the balancing of State and national interests. *Nashville etc. Ry. Co. v. Alabama,* 128 U. S. 96, upheld a State statute forbidding persons afflicted with color blindness from serving on railroads. The Court seems to have been impressed with the importance to public safety of having some regulation of the matter, and if State regulation were too great an inconvenience to commerce it was within the power of Congress to assume the responsibility. *New York etc. Ry. v. New York,* 165 U. S. 628, upheld a State statute prohibiting heating of passenger cars by stoves, and observed that the statute had "a

real substantial relation to an object as to which the State is competent to regulate, namely, the personal security of those who are passengers on cars used within its limits." A long line of cases upholding reasonable regulations by the States of railroad personnel and equipment can be cited to the same effect. *South Covington etc. Ry. v. Covington,* 235 U. S. 537, upheld some regulations, and invalidated others upon the ground that they were "unreasonable" and hence direct burdens upon interstate commerce. *Seaboard, etc. R. v. Blackwell,* 244 U. S. 310, invalidated upon the same reasoning a Georgia Law requiring trains to slacken speed at every grade crossing. Compare, *Southern R. Co. v. King,* 217 U. S. 524. *Hennington v. Georgia,* 163 U. S. 299, upheld a statute which prohibited the running of any freight train on Sunday. It is quite possible that the case would be decided differently today than forty years ago, upon the practical view that the national interest in continuous freight service is today more forceful than the local interest in Sabbath observance. State statutes requiring passenger trains to stop at county seats have been sustained in three cases *(Gladsen v. Minnesota,* 166 U. S. 427; *Cleveland etc. R. Co. v. Illinois,* 177 U. S. 514; *Gulf etc. R. Co. v. Texas,* 246 U. S. 58), and held void in one case *(Mississippi R. Com. v. Ill. Cent. R. Co.,* 203 U. S. 335), the decision in each case depending upon a balancing of local needs against the interests of interstate commerce. To similar effect are about a dozen cases wherein this Court has solemnly weighed the needs for train service by villages of various sizes, and the dislocation placed upon traffic by requiring the service to be given, so as to determine whether an order for such service "burdens interstate commerce".

A Texas statute requiring trains to start not later than 30 minutes after scheduled departure was held bad, apparently upon the view that it was unreasonable. *Missouri etc. R. v. Texas*, 245 U. S. 484.

In more recent times State regulation of automobiles and motor trucks has been subjected to judicial review as to its reasonableness and whether it is a burden upon interstate commerce. Until Congress acts in that field the tendency seems to be to hold that State regulation which satisfies the Fourteenth Amendment does not offend the Commerce Clause. See *Hendrick v. Maryland*, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160; *Michigan P. U. C. v. Duke*, 266 U. S. 570; *Buck v. Kuykendall*, 267 U. S. 307; *Bush and Sons Co. v. Maloy*, 267 U. S. 317; *Interstate Busses Corp. v. Holyoke St. R.*, 273 U. S. 45; *Morris v. Duby*, 274 U. S. 135; *Hess v. Pawloski*, 274 U. S. 352; *Clark v. Poor*, 274 U. S. 554; *Sproles v. Binford*, 286 U. S. 374; *Continental Baking Co. v. Woodring*, 286 U. S. 352; *Bradley v. P. U. C.*, 289 U. S. 92; *Hicklin v. Coney*, 290 U. S. 169.

In only three of those cases was the State regulation held invalid. In *Michigan P. U. C. v. Duke*, it was held that requiring private contract motor carriers to become common carriers was a violation of the Commerce Clause and also of the Fourteenth Amendment. Mr. Justice Butler said (page 577):

> "It is well settled that a State has no power to fetter the right to carry on interstate commerce within its borders by the imposition of conditions or regulations which are unnecessary and pass beyond the bounds of what is reasonable and suitable for the proper exercise of its powers in the field that belongs to it."

The cases of *Buck v. Kuykendall* and *Bush & Sons Co. v. Maloy* involved limitations upon competition in the use of the public highways by common carriers for hire. The plaintiff in each case was engaged exclusively in interstate transportation, some significance was attached to the policy implied in Federal-aid highways that State highways be open to interstate commerce, and the regulation was of a sort peculiarly difficult for each State to administer independently, as was illustrated by the fact that Buck's proposed auto stage line from Portland to Seattle had been certified by Oregon to be necessary and by Washington to be objectionable. The purpose of Washington was one that would justify the regulation as applied to intrastate carriers, but also it was one that could be effectuated reasonably well if limited to that class. Under all the circumstances the burden imposed upon interstate commerce seemed to be direct, substantial, selfish and unnecessary. A few years later a regulation which imposed an equal burden upon interstate commerce, but for the clearly avowed purpose of protecting public safety upon the then congested highways, was sustained. *Bradley v. Pub. Util. Comm.*

Instrumentalities of commerce which by their nature tend to have important effects upon the safety and welfare of the inhabitants of the States through which they pass, such as trains and motor carriers, necessarily have been submitted to a considerable amount of regulation, and until Congress occupies the field any reasonable State regulation is upheld. Other instrumentalities, such as telegraph companies and express companies, have less need for regulation under the police power, and tend to receive their principal

regulation from Congress. For one reason or another interstate ferries and bridges and navigation have been primarily a matter of Federal concern. Most of the decisions about State regulation of those instrumentalities have been to the effect that the regulation is a direct burden upon interstate commerce. That conclusion follows from the nature of the instrumentalities; they are not subject to important local interests to which their regulation under the police power is "incidental".

A State can quarantine against diseased animals which have come to it in interstate commerce *(Kimmish v. Ball,* 129 U. S. 217; *Missouri, etc. R. v. Haber,* 169 U. S. 613; *Rasmussen v. Idaho,* 181 U. S. 198; *Reid v. Colorado,* 187 U. S. 137; *Asbell v. Kansas,* 209 U. S. 251). Sometimes such cases are explained upon the ground that "diseased animals are not legitimate articles of commerce" and hence a State can forbid them admission within its borders. Obviously that statement argues in a circle. Animals which have merely been exposed to disease likewise can be barred *(Smith v. St. Louis etc. R. Co.,* 181 U. S. 248, 255-256; *Mintz v. Baldwin,* 289 U. S. 346). The only case where such a quarantine was held bad under the Commerce Clause could equally well have been decided under the Fourteenth Amendment, upon the ground that the regulation was unreasonable. *(Hannibal etc. R. v. Husen,* 95 U. S. 465.) The Court said that the State statute went beyond what was needed to protect State interests.

Similarly, inspection laws have been upheld as to tobacco, coal, lumber, fertilizer, beer, hides, oil and

stock food. The types of inspection laws disapproved in *Minnesota v. Barber*, 136 U. S. 313, *Brimmer v. Rebman*, 138 U. S 78, and *Voight v. Wright*, 141 U. S. 62, were deliberately discriminatory and unreasonable; those cases might equally well have been decided under the Fourteenth Amendment.

In the exercise of its police power a State may prohibit or condition the sale within its borders of various commodities which have come from other States, not only to protect the health and morals of its people, but also for their economic protection. *Plumley v. Massachusetts*, 155 U. S. 461, related to oleomargarine colored in imitation of yellow butter, and negatived the proposition that a State is powerless to prevent the sale of articles manufactured in or brought from another State, if their sale may cheat people into purchasing something they do not intend to buy and which is wholly different from what its condition and appearance indicate (Page 474). The case of *Collins v. New Hampshire*, 171 U. S. 30, holding invalid a law requiring that oleomargarine be colored pink, could equally well have been decided under the Fourteenth Amendment. *Schollenberger v. Pennsylvania*, 171 U. S. 1, held invalid a statute applicable to uncolored as well as yellow oleomargarine. One peculiar element in the case seems to have been that the Federal government had taxed oleomargarine and was thought to have recognized it as a respectable article of commerce (pages 8-9, 18-19), and there is some indication in the opinion, notwithstanding its citation of *Powell v. Pennsylvania*, 127 U. S. 678, that the Court regarded the regulation of uncolored oleomargarine as unreasonable.

Austin v. Tennessee, 179 U. S. 343, upheld a prohibition of the selling of cigarettes, saying (349):

> "We have had repeated occasion to hold, where state legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that if the action of the State legislature were a bona fide exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce."

The case of *Crossman v. Lurman,* 192 U. S. 189, upheld a New York statute against adulterated coffee.

In *Savage v. Jones,* 225 U. S. 501, Mr. Justice Hughes said (524-525):

> "The State cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce. [Citations omitted.] But when the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority."

To similar effect, see *Price v. Illinois,* 238 U. S. 446, involving retail sale of a canning compound which contained boric acid, and *Armour & Co. v. North Dakota,* 240 U. S. 510, which upheld a statute requiring lard to be sold in containers of certain standard sizes, and *Corn Products Rfg. Co. v. Eddy,* 249 U. S. 427, 432-433. *Hebe Co. v. Shaw,* 248 U. S. 297, sustained a prohibition against sale in Ohio of condensed milk made in part from cocoanut oil, to save the pub-

lic from the fraudulent substitution of the wholesome but cheaper product. Mr. Justice Holmes first concluded that the law did not violate the Fourteenth Amendment and then stated that it did not violate the Commerce Clause either (page 303). The case of *Hygrade Provision Co. v. Sherman,* 266 U. S. 497, is to similar effect, and already has been quoted.

Silz v. Hesterberg, 211 U. S. 31, upheld New York in prohibiting, during the closed season on native game birds, possession within its borders of dead game birds of those or other varieties. An importer was convicted for possessing game birds taken in England and Russia. This is an illustration of the result to be reached when the protection of an important State interest is weighed against a relatively insignificant burden upon interstate commerce.

In the *License Cases,* 5 How. 504, State liquor license laws were held valid, against even a sale in the original package of liquor received from another State. In deciding *Austin v. Tennessee,* 179 U. S. 343, there was some dictum to similar effect (page 348) including the following:

> "If the legislative body come deliberately to the conclusion that a due regard for the public safety and morals requires a suppression of the liquor traffic, there is nothing in the commercial clause of the Constitution, or in the Fourteenth Amendment to that instrument, to forbid its doing so."

The fact is, however, that the decisions of the Court from *Bowman v. Chicago etc. R. Co.,* 125 U. S. 465, to *Rosenberger v. Pacific Express Co.,* 241 U. S. 48, have treated interstate transactions in intoxicating liquor

much more protectively than similar transactions in diseased cattle or colored oleomargarine or a considerable number of other commodities subjected to local suspicion or disapproval. In the oleomargarine case it was suggested that the justification for giving the States greater scope to regulate that commodity than was recognized for beer was that colored oleomargarine was an instrument of fraud and genuine beer was relatively inoffensive. (*Plumley v. Massachusetts*, 155 U. S. 461, 474). A recent commentator on the Commerce Clause (Bernard C. Gavit, *supra*) says that the liquor decisions are peculiar:

> "The Supreme Court has clung tenaciously to the theory that an intrastate sale of intoxicating liquor could be prohibited under the Fourteenth Amendment (*Mugler v. Kansas*, 123 U. S. 623) but that an interstate sale could not be prohibited under the Commerce Clause. (*Leisy & Co. v. Hardin*, 135 U. S. 100; *Kirmeyer v. Kansas*, 236 U. S. 568). The difference in result can only be explained on the ground that the court decided the commerce clause cases on something other than the real facts. The court ascribed to the right or privilege to do interstate business a sanctity which it properly does not enjoy. State action which is reasonable under the Fourteenth Amendment ought to be a reasonable justification for a state prohibition of interstate commerce. The fact of interstate commerce in this type of case weighs but little; the Federal government and those engaged in interstate commerce have no reasonably compelling interest in selling a commodity which a state has otherwise reasonably adjudged to be unfit for sale." (page 54.)

State regulations of peddlers are strongly under suspicion of being discriminatory against goods of extra-state origin. *Welton v. Missouri*, 91 U. S. 275, *Webber v. Virginia*, 103 U. S. 344, and *Corson v. Maryland*, 120

U. S. 502, involved statutes obviously having such a purpose. The leading case of *Robbins v. Taxing District,* 120 U. S. 489, involved a Tennessee statute imposing a tax upon all drummers, "not having a regularly licensed house of business in the Taxing District." The invalidity of such a statute can be explained either upon the ground that it involves a concealed discrimination, or that its application is directly upon an instrumentality of interstate commerce without being incidental to the service of some proper State purpose. The most recent of that line of cases is *Real Silk Mills v. Portland,* 268 U. S. 325. Had the ordinance there involved required only a bond to insure final delivery of the ordered goods, supported by evidence that such a requirement was needed to meet an actual evil and was suited to that purpose, presumably the ordinance would have been sustained. Compare *Continental Baking Co. v. Woodring,* 286 U. S. 352, 365-366. A local regulation of peddlers and order takers inherits and must meet a considerable weight of suspicion, but if sincerely undertaken to protect a genuine local interest it should not be invalid because of incidental burdens upon interstate commerce.

The cases thus far considered have mostly been concerned either with State regulation of instrumentalities of interstate commerce or else with regulation of goods by the State where they are delivered or attempted to be delivered. There are some interesting cases about regulation of goods in the State where they are produced, which illustrate the same general principles. In *Geer v. Connecticut,* 161 U. S. 519, it was held that the State could prohibit the transportation of its wild animals beyond its borders. *Lacoste v.*

Dept. of Conservation, 263 U. S. 545, upheld a tax by Louisiana upon hides of wild animals and alligators, involving somewhat similar considerations. *Foster-Fountain Packing Co. v. Haydel,* 278 U. S. 1, held invalid a Louisiana statute which prohibited removal from the State of the waste involved in shrimp packing. The statute was held bad because the burden it imposed upon interstate commerce was direct and deliberate and not incidental to any proper State purpose. Mr. Justice Butler said (page 13):

> "The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi [Mississippi] plants."

McLean v. Denver & Rio Grande R., 203 U. S. 38, involved a statute which provided for inspection of all hides of slaughtered cattle and a record to be kept of brands and other data. There was provision for inspectors of hides, who were to receive a fee of ten cents for each hide. It was made an offense for any railroad to receive an uninspected hide for shipment out of the Territory of New Mexico, and the case arose under that provision. Mr. Justice Day said that the purpose of the statute was to discourage cattle-stealing, and the provision about shipment was necessary for that purpose. He upheld it, saying (page 55):

> "The exercise of the police power may and should have reference to the peculiar situation and needs of the community. The law under consideration, designed to prevent the clandestine removal of property in which a large number of people in the Territory are interested, seems to us an obviously rightful exercise of this power. It is true it affects interstate commerce, but we do not think

> such was its primary purpose, and while it may have an effect to levy a tax upon this class of property, the main purpose evidently was to protect the people against fraud and wrong."

Sligh v. Kirkwood, 237 U. S. 52, upheld a Florida statute forbidding sale or shipment from its borders of citrus fruits immature or otherwise unfit for consumption. This was justified as a protection of Florida's reputation in the fruit business, and undoubtedly had a strong tendency to support its market for the better grades of fruit. Mr. Justice Day said (60-62):

> "Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the State. * * * The protection of the State's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose."

Lemke v. Farmers Grain Co., 258 U. S. 50, held invalid a North Dakota statute regulating grain buying. Mr. Justice Day stated that North Dakota was a great grain-growing State, producing annually large crops, particularly wheat, for shipment beyond its borders. The principal markets were at Minneapolis and Duluth, and there was practically no market in North Dakota. Purchases were generally made with the intention of shipping the grain to Minneapolis (pages 53-54). The statute showed a comprehensive scheme to regulate the buying of grain. Purchases could only be made by those who held licenses from the State

and acted under a system of grading, inspecting and weighing fully defined in the act. The State grain inspector had power to determine the margin of profit to be realized by the buying, which necessarily meant that he fixed the buying price, inasmuch as the selling price was established by competition (pages 56-57). The majority of the Court concluded that grain buying, under the circumstances involved, necessarily was interstate commerce, and the statute was a direct regulation of it and unconstitutional. It said nothing to encourage the idea that the price fixing features of the statute would have been sustained under the Fourteenth Amendment if they had been applied primarily to intrastate transactions, or even if limited to those.

That decision was followed in *Shafer v. Farmers Grain Co.*, 268 U. S. 189. The statute involved was somewhat like that involved in the Lemke case and was of very ambitious scope. Mr. Justice Van Devanter, who delivered the majority opinion, noted that 90 per cent of the wheat bought in North Dakota was shipped outside the State. He stated the general rules which might be applicable as follows (page 199):

> "The decisions of this Court respecting the validity of state laws challenged under the commerce clause have established many rules covering various situations. Two of these rules are specially invoked here; one, that a state statute enacted for admissable state purposes and which affects interstate commerce only incidentally and remotely is not a prohibited state regulation in the sense of that clause; and the other, that a state statute which by its necessary operation directly interferes with or burdens such commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted. These rules although readily understood and entirely

> consistent, are occasionally difficult of application; as where a state statute closely approaches the line which separates one rule from the other. As might be expected, the decisions dealing with such exceptional situations have not been in full accord. Otherwise the course of adjudication has been consistent and uniform."

Mr. Justice Van Devanter concluded that the regulation of the North Dakota grain trade fell within the second of the rules stated, because it attempted to exercise a large measure of control over wheat buying, about 90 per cent of which was in interstate commerce. As an example of a more modest statute, imposing burdens upon interstate commerce only incidentally, he cited *Merchants Exchange v. Missouri,* 248 U. S. 365.

The two North Dakota wheat cases involved a type of regulation with which the Court obviously was less sympathetic than with that involved in *Sligh v. Kirkwood.* Because of the nature of the regulation and the peculiar facts of the North Dakota wheat trade the burden upon interstate commerce was direct rather than incidental. Mr. Justice Holmes, in his opinion in *Superior Oil Co. v. Mississippi,* 280 U. S. 390, 396, alluded to the wheat cases as follows:

> "Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here."

A State can condition the production of a natural resource within its borders upon payment of a tax (*Heisler v. Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron*

Min. Co. v. Lord, 262 U. S. 172; *Hope Natural Gas Co. v. Hall,* 274 U. S. 284; *Utah Power & Light Co. v. Pfost,* 286 U. S. 165), even when it is obvious that the article produced is destined to go in interstate commerce. Similarly the State can condition the production of petroleum within its borders, although destined to go in interstate commerce, upon methods of production being employed which are not wasteful or unfair to adjoining owners. (*Champlin Rfg. Co. v. Comm.,* 286 U. S. 210). The State cannot condition production upon the article being withheld from interstate commerce (*Oklahoma v. Kansas Nat. Gas Co.,* 221 U. S. 229), or, what is a lesser degree of the same thing, upon the people of the State of production being preferred in its sale. (*Penn. v. West Virginia,* 262 U. S. 553.)

Mr. Justice Holmes in his dissenting opinion in the case last cited said, "I know of no relevant distinction between taxing and regulating in other ways." (page 601.) The fact that the Court upheld West Virginia in imposing a production tax upon gas (*Hope Natural Gas Co. v. Hall*), but not in regulating its production by requiring that the needs of its citizens be first supplied (*Penn. v. West Virginia*), indicates that there is a distinction between the limitations imposed by the Commerce Clause upon the taxing power and those imposed upon the police power. The case of *Sonneborn Bros. v. Cureton,* 262 U. S. 506, is thought by some persons to indicate the same thing. To avoid that question this brief discusses very few tax cases. It would seem that some difference between tax cases and police power cases would necessarily arise from the practical implications of those different purposes.

Procurement of revenue is obviously an appropriate purpose of State legislation, justifying some incidental burdens upon goods and facilities in interstate commerce, but the avoidance of tax duplication and other considerations relevant to the purpose may set the limits upon its exercise somewhat differently from those upon a particular exercise of the police power.

Preserving to its people an adequate water supply is by long custom and the essential nature of the commodity a more appropriate and important State purpose than preserving a supply of gas or petroleum. Perhaps that reasoning, which Mr. Justice Holmes stated as, "the limits set to property by other public interests," explains why a riparian proprietor has not the same right to withdraw a water supply from the State as he can gas or oil. The decision is that the State can forbid taking water for the purpose of removing it in interstate commerce. *(Hudson County Water Co. v. McCarter,* 209 U. S. 349.)

Thus far under this point enough cases have been considered to illustrate, in a fair way, the limitations which the Commerce Clause places upon State exercise of the police power. The cases cited fall roughly into three groups. The first group includes regulations affecting instrumentalities of interstate commerce, such as trains, automobiles, motor trucks and busses. Reference is made to telegraph companies, express companies, ferries and bridges and navigation. Perhaps order takers should be mentioned here, and the grain elevators of North Dakota. The second group includes regulations of goods by the State of destination, such as cattle quarantines, weights and inspections, laws

about oleomargarine and fraudulent and adulterated foods, imported game and liquor. The third group includes regulations of goods by the State of production, such as game and shellfish, hides in New Mexico, Florida oranges, North Dakota wheat, natural gas and petroleum, and water.

The effort has been to illustrate a process of decision, rather than cite only favorable cases. Of 66 cases cited (ignoring a few which are inconclusive or merely incidental to argument) 40 resulted in upholding the State regulation and 26 were adverse. The proportions, at least, seem to be approximately representative, because of 72 cases decided by this Court in the last fifteen years 49 resulted in upholding the State regulation and 23 were adverse.*

It is respectfully submitted that the process of decision illustrated by cases of State regulatory statutes in fields not taken over by the Federal government involves answering three questions: *First,* is the statute sincerely and reasonably directed to a proper purpose of government so that it can be justified under the Fourteenth Amendment. *Second,* is the purpose primarily a matter of local concern; is it important

* Tax cases are omitted, and so are cases where the State statute conflicted with a Federal regulation. The 72 cases are believed to include all other cases decided by this Court in the years 1920-1934 wherein a State statute or regulation was challenged under the Commerce Clause. Decision was adverse to the State statute or regulation in the following 23 cases: **Wells Fargo & Co. v. Taylor, 254 U. S. 175; St. Louis, etc. R. v. P. S. C., 254 U. S. 535; Dahnke-Walker Mill Co. v. Bondurant, 257 U. S. 282; Lemke v. Farmers Grain Co., 258 U. S. 50; Lemke v. Homer Farmers El. Co., 258 U. S. 65; St. Louis Etc. R. v. P. S. C., 261 U. S. 369; Davis v. Farmers Co-op. Co., 262 U. S. 312; Penn v. West Virginia, 262 U. S. 553; Atchison R. Co. v. Wells, 265 U. S. 101; Missouri v. Kansas Nat. Gas Co., 265 U. S. 298; Michigan P. U. C. v. Duke, 266 U. S. 570; Flanagan v. Fed. Coal Co., 267 U. S. 222; Buck v. Kuykendall, 267 U. S. 307; Bush & Sons Co. v. Maloy, 267 U. S. 317; Real Silk Mills v. Portland, 268 U. S. 325; DiSanto v. Pennsylvania, 273 U. S. 34; P. U. C. v. Attleboro Co., 273 U. S. 83; Mayor v. McNeely, 274 U. S. 676; Foster-Fountain P. Co. v. Haydel, 278 U. S. 1; Johnson v. Haydel, 278 U. S. 16; Lawrence v. Ry. Co., 278 U. S. 228; Michigan C. R. v. Mix, 278 U. S. 492; Furst v. Brewster, 282 U. S. 493.**

relatively to the burdens which it is charged with placing upon interstate commerce. *Third,* is the statute non-discriminatory against interstate commerce. A negative answer to any one of those questions may readily be phrased as an answer to another, or stated in terms of the dogma that a State cannot regulate or directly burden interstate commerce,* but the decisive considerations in any case precipitate about one or another of those three questions. To restate the matter as it is stated in the heading to this point, the rule is that a regulation so necessary and reasonable that it is valid for application to strictly intrastate business is not forbidden to have some incidental effects upon interstate commerce, and that means that when its subject matter is primarily of local concern a regulation which is justifiable under the Fourteenth Amendment and which neither discriminates against interstate commerce nor conflicts with any Federal regulation is justifiable under the Commerce Clause.

POINT V.

There is need that the State power be upheld. The decree below should be reversed insofar as it grants injunction against the defendants.

It is often said nowadays that there is a fatal weakness in the interpretation which has grown up around the Commerce Clause; that its interpretation as a restraint against State action has so far outrun interpretation permitting Federal regulation that much business about which there ought to be a law has es-

* See note at 27 Col. L. Rev. 573 entitled, "The 'direct burden' test of the constitutionality of State statutes affecting interstate commerce".

caped into a twilight zone beyond the reach of either.* Usually that line of reasoning proceeds from the fact or the assumption that the individual States cannot regulate effectively some matter, such as child labor in industries, to the conclusion that the United States should regulate it.

In the present case we are dealing with something that a State can regulate effectively unless the Commerce Clause forbids. There is probably no fluid milk market in the United States involving more interstate milk than New York City and most of them are entirely intrastate. Yet even as to New York City the business is predominantly intrastate, and conditions are such that the State which is interested through its consuming public and through the greater proportion of the producers can enforce a uniform rule. It does not appear that any neighboring State resents that claim of power; Pennsylvania and New Jersey, at least, agree through their statutes that the price of milk paid to the producer should be fixed by the consuming market. The case of natural gas presents some analogies and some differences. *Penn. Gas. Co. v. P. S. C.*, 252 U. S. 23; *Peoples Nat. Gas. Co. v. P. S. C.*, 270 U. S. 550; *Western Dist. Corp. v. P. S. C.*, 285 U. S. 119. The case of goods made by child labor and moving freely in a nation-wide commerce presents no true analogy, not only because of the difference in the commerce but also because of the difference in the purpose for regulating the manufactured goods of extra-state origin. A State regulating the milk shed from which its consumers de-

* Edward S. Corwin, "The Twilight of the Supreme Court", page 20; Rexford G. Tugwell, "The Industrial Discipline", pages 191-203; Robert L. Stern, "That Commerce which concerns more States than one", 47 Harv. L. Rev. 1335; Kenneth F. Burgess, "The twilight zone between the police power and the Commerce Clause", 15 Iowa L. Rev. 162.

rive a daily supply of food regulates the entire area with an even purpose related to the product itself; a State forbidding child labor within its borders and forbidding other States to send it the products of their child labor has supplemented a regulation of local health or morals, not directed to anything inherent in the product, by another regulation purely economic in purpose directed at the product. It is doubted that a State can do that; the extent to which a State can "burden" interstate commerce in endeavors to eliminate child labor is suggested by the case of *C. & O. R. Co. v. Stapleton,* 279 U. S. 587, 593.

When the Health Department of New York City inspects farms and milk plants in other States for shipment of milk to its market it obviously acts beyond the borders of the State and produces substantial effects upon interstate commerce. The nature of milk commerce is such that it is accustomed to that type of regulation. If there were objection, conceivably the inspectors might withdraw within the borders of New York State and turn back each shipment of milk from an unapproved source. Undoubtedly a State may exercise its police power within its borders in the light of relevant facts beyond them, and notwithstanding effects produced thereby in other States. *Carroll v. Greenwich Ins. Co.,* 199 U. S. 401; *Hammond Packing Co. v. Arkansas,* 212 U. S. 322; *Standard Oil Co. v. Tennessee,* 217 U. S. 413; *German Alliance Ins. Co. v. Hale,* 219 U. S. 307; *Crescent Oil Co. v. Mississippi,* 257 U. S. 129; *Firemen's Ins. Co. v. Beha,* 30 Fed. 2nd 539, affd. 278 U. S. 580; *Western Dist. Co. v. Comm.,* 285 U. S. 119.

The regulation now involved is effective after the milk produced in Vermont has come to New York State and "come to rest within the State." *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 478-479; *Edelman v. Boeing Air Transp.*, 289 U. S. 249, 252; *Minnesota v. Blasius*, 290 U. S. 1, 8-12; and *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, 95, are tax cases interpreting that language. If the purpose of the State statute is an appropriate State concern there comes a time when the statute becomes effective against the milk brought from Vermont.

The District Court has held that the time is defined by the doctrine of "original packages." The State may not interfere when G. A. F. Seelig, Inc. sells its cans of milk to a restaurant, but may pounce upon the restaurant proprietor when he sets a glass before a customer. The District Court seemed little satisfied with the result, but thought it required by precedents:

> "Whatever may be thought of so accidental a measure for the distribution of governmental powers, in view of the recent approval of the doctrine it does not seem to us an inferior court is free to treat it as open to debate. So far as we are to have a more realistic canon, it must be worked out step by step by the Supreme Court." (R. 52.)

The "original package" has often been suggested as the physical symbol of the importers' interests protected in the name of interstate commerce, and its breaking up as the uttermost limit to which those interests will be protected. Probably this is a rule of thumb, and something will depend upon the relative urgencies of the Federal interests and State interests practically involved in a particular case. In recent

years it is perceived that there can be no fixed rule for separating interstate commerce from intrastate commerce because they run into each other as day runs into night; in their extremes they are different but there is no definite and unvarying dividing line. Not always will the "original package" receive immunity from State regulation *(Hygrade Provision Co. v. Sherman,* 266 U. S. 497; *Sonneborn Bros. v. Cureton,* 262 U. S. 506), and in one case Federal interests were found to extend beyond the breaking up of the "original package", and "follow the adulterated or misbranded article at least to the shelf of the importer." *(McDermott v. Wisconsin,* 228 U. S. 115, 135.)

Presumably milk bottled in another State and shipped in cases is not sold at retail in an "original package" and may be regulated at that time. *May v. New Orleans,* 178 U. S. 496; *Austin v. Tennessee,* 179 U. S. 343; *Cook v. Marshall Co.,* 196 U. S. 261; *Purity Extract Co. v. Lynch,* 226 U. S. 192, 200-201; *Price v. Illinois,* 238 U. S. 446, 454-455; *Armour & Co. v. North Dakota,* 240 U. S. 510, 517; *Hebe Co. v. Shaw,* 248 U. S. 297, 304.

It is respectfully submitted that under all the circumstances the regulation by the State should be upheld, and for milk in cans no less than for milk in bottles. If the State regulation is held invalid there will be no remedy for the milk shed as a whole except through concurrent State and Federal action; but if the State regulation is upheld and any inconvenience to interstate commerce is experienced the Secretary of Agriculture already has power to correct that situation. As was said by Mr. Justice McReynolds and

Mr. Justice Sutherland, dissenting in *Oregon-Washington Co. v. Washington*, 270 U. S. 87, 103:

> "It is a serious thing to paralyze the efforts of a State to protect her people against impending calamity and leave them to the slow charity of a far-off and perhaps supine Federal bureau."

A similar thought was expressed by Mr. Justice Holmes in *Superior Oil Co. v. Mississippi*, 280 U. S. 390, 395:

> "The importance of the commerce clause to the Union of course is very great. But it also is important to prevent that clause being used to deprive the States of their lifeblood by a strained interpretation of facts."

It is respectfully submitted that there is need that the State power be upheld. The decree below should be reversed insofar as it grants injunction against the defendants.

JOHN J. BENNETT, JR.,
Attorney General of New York State.

HENRY EPSTEIN,
Solicitor General.

HENRY S. MANLEY,
Counsel for N. Y. S. Department of Agriculture and Markets.

Solicitors for Appellants in No. 604 and for Respondents in No. 605.